Malayan Banking Bhd v Charterefield Corp Sdn Bhd

HIGH COURT (KUALA LUMPUR) — SUIT NO D9–22–1745 OF 2000
RAMLY ALI JC
8 MAY 2001

Civil Procedure *— Affidavits — Deposition by solicitor — Conditions to be fulfilled before solicitor could depose on behalf of litigant — Whether affidavit defective*

The appellant filed an application to substitute the name 'Malayan Banking Bhd' cited in the title of the writ with 'Aseambankers Malaysia Bhd' as the plaintiff. The application was supported by an affidavit deposed by the solicitor for the appellant. It was deposed that the application to amend the name of the plaintiff in the title of the writ was not a contentious matter. It was purely based on clerical error on the part of the solicitors office preparing the writ. The said clerical error was only in respect of the title of the writ but not the statement of claim. The respondent raised a preliminary objection that the affidavit in support of the application should not be deposed by the solicitors for the appellant, but must be deposed by the appellant itself. It was submitted that the affidavit was defective and thus the application should be dismissed. The senior assistant registrar allowed the preliminary objection and dismissed the appellant's application. The appellant appealed.

Held, allowing the appeal:

(1) A solicitor may depose an affidavit on behalf of the litigant if the following conditions are fulfilled: (i) the facts to be deposed must not be contentious or disputed question of facts; (ii) the facts to be deposed must be from his knowledge; and (iii) he is authorised by the litigant to depose the affidavit (see p 165F–H).

(2) In the present case, the name of the plaintiff in the title of the writ was not a contentious issue as far as the respondent was concerned. It was not part of the statement of claim. The statement of claim remained unchanged. Thus the appellant had fulfilled the first condition (see p 166C–E).

(3) The issue that needs to be amended in the application entirely related to the preparation of the writ to be filed in court. It is common knowledge that this job is to be done by the solicitors. Thus the only person who has personal knowledge about the matter is the solicitor concerned. As such, the court was satisfied that the second condition was also fulfilled (see pp 166G–167A).

(4) In para 2 of the affidavit the deponent had stated that: 'Saya adalah peguamcara yang mengendalikan perkara ini bagi plaintif dan diberi kuasa untuk membuat dan mengikrarkan afidavit ini bagi pihaknya'. With this assertion, the third condition was fulfilled (see p 167B–C).

(5) The application of the appellant to amend the title of the writ was plainly and obviously trivial in nature. Thus it could be allowed without having to satisfy the principle laid down in *Yamaha Motor Co Ltd v Yamaha (M) Sdn Bhd & Ors* [1983] 1 MLJ 213. In any event the court found that the three principles laid down in *Yamaha* were fulfilled in that the application was bona fide; the prejudice, if any, caused to the respondent can be compensated by costs and the amendment would not in effect turn the suit from one character into a suit of another and inconsistent character (see p 169G–I).

[**Bahasa Malaysia summary**

Perayu telah memfailkan satu permohonan untuk menggantikan nama 'Malayan Banking Bhd' yang tertera pada tajuk writ dengan 'Aseambankers Malaysia Bhd' sebagai plaintif. Permohonan tersebut telah disokong oleh satu afidavit yang dideposkan oleh peguamcara bagi pihak perayu. Adalah dideposkan bahawa permohonan untuk meminda nama plaintif pada tajuk writ tersebut bukan satu perkara yang bertikaian. Ia semata-mata berdasarkan kesilapan perkeranian di pihak pejabat peguamcara yang menyediakan writ tersebut. Kesilapan perkeranian tersebut hanya berhubung tajuk writ tersebut dan bukan pernyataan tuntutan. Responden telah menimbulkan satu bantahan awal bahawa afidavit sokongan permohonan tersebut tidak sepatutnya dideposkan oleh peguamcara bagi pihak perayu, tetapi mestilah dideposkan oleh perayu sendiri. Adalah dihujahkan bahawa afidavit tersebut adalah cacat dan oleh itu permohonan tersebut hendaklah ditolak. Penolong kanan pendaftar telah membenarkan bantahan awal tersebut dan menolak permohonan perayu. Perayu telah membuat rayuan.

Diputuskan, membenarkan rayuan tersebut:

(1) Seorang peguamcara boleh mendeposkan satu afidavit bagi pihak litigan jika syarat-syarat berikut dipenuhi: (i) fakta-fakta yang patut dideposkan mesti tidak merupakan persoalan fakta-fakta bertikaian atau dipertikaian; (ii) fakta-fakta yang patut dideposkan mestilah daripada pengetahuan beliau; dan (iii) beliau diberi kuasa oleh litigan untuk mendeposkan afidavit tersebut (lihat ms 165F–H).

(2) Di dalam kes ini, nama plaintif pada tajuk writ tersebut bukan satu persoalan bertikaian sejauh mana responden terlibat. Ia bukan sebahagian pernyataan tuntutan. Pernyataan tuntutan tersebut kekal tidak berubah. Oleh itu perayu telah memenuhi syarat pertama (lihat ms 166C–E).

(3) Persoalan yang perlu dipinda di dalam permohonan tersebut secara menyeluruh berkaitan dengan penyediaan writ yang difailkan di mahkamah. Adalah pengetahuan umum bahawa

tugas ini dilakukan oleh peguamcara. Oleh itu satu-satunya orang yang mempunyai pengetahuan peribadi tentang perkara tersebut adalah peguamcara berkaitan. Justeru itu, mahkamah berpuas hati bahawa syarat kedua juga telah dipenuhi (lihat ms 166G–167A).

(4) Dalam perenggan 2 afidavit, deponen telah menyatakan bahawa: 'Saya adalah peguamcara yang mengendalikan perkara ini bagi plaintif dan diberi kuasa untuk membuat dan mengikrarkan afidavit ini bagi pihaknya'. Dengan penegasan ini, syarat ketiga telah dipenuhi (lihat ms 167B–C).

(5) Permohonan perayu untuk meminda tajuk writ tersebut adalah dengan jelas dan nyata bersifat remeh. Oleh itu ia boleh dibenarkan tanpa memuaskan prinsip yang dinyatakan dalam *Yamaha Motor Co Ltd v Yamaha (M) Sdn Bhd & Ors* [1983] 1 MLJ 213. Selanjutnya mahkamah mendapati bahawa ketiga-tiga prinsip yang dinyatakan dalam *Yamaha* telah dipenuhi di mana permohonan tersebut adalah bona fide; prejudia, jika ada, terhadap responden boleh diberikan pampasan dengan kos dan pindaan tersebut tidak mengakibatkan guaman tersebut bertukar daripada satu sifat kepada satu guaman lain dan bersifat tidak konsisten (lihat ms 169G–I).]

Notes

For cases generally, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 219–293.

Cases referred to

Kaplands Sdn Bhd v Lee Chin Cheng Dengkil Oil Palm Plantations Sdn Bhd [2001] 1 MLJ 297 (refd)

Million Group Credit Sdn Bhd v Lee Shoo Khoon & Ors [1985] 1 CLJ 1 (refd)

Sabah Bank Bhd v Pemborong Keningau Sdn Bhd & Ors [1991] 3 CLJ 2590 (refd)

Samsuri Welch bin Abdullah @ Samuel Ponniah Welch v Ong Liang Hee & Anor [1999] 3 AMR 2955 (refd)

Seng Huat Hang Sdn Bhd v Chee Seng & Co Sdn Bhd [1986] 1 MLJ 348 (refd)

Tan Pow & Anak-Anak Sdn Bhd v Pelasari Sdn Bhd & Ors [1999] 1 CLJ 165 (refd)

Yamaha Motor Co Ltd v Yamaha (M) Sdn Bhd [1983] 1 MLJ 213 (refd)

Legislation referred to

Rules of the High Court 1980 O 20 r 5, O 41 r 5

N Segaran (*Shearn Delamore & Co*) for the appellant.
Wan Shahrizal (*Wan Shahrizal Hari & Co*) for the respondent.

Ramly Ali JC:

Introduction

This is an appeal by the appellant ('the plaintiff') to the judge in chambers against the decision of the learned senior assistant registrar ('the SAR') made on 4 April 2001 whereby the learned SAR had allowed the defendant's preliminary objection and subsequently dismissed the appellant's application to amend the name of the plaintiff in the writ of summon (encl 1) by way of summon in chambers dated 16 February 2001 (encl 20).

Originally the name of the plaintiff cited in the title of the writ was 'Malayan Banking Bhd'. Subsequently, the appellant filed an application by way of a summon in chambers dated 16 February 2001 (encl 20) to substitute the name 'Malayan Banking Bhd' with 'Aseambankers Malaysia Bhd' as the plaintiff. The said application was supported by an affidavit in support deposed by Shaikh Abdul Saleem on 15 February 2001 (encl 21). The said Shaikh Abdul Saleem is an advocate and solicitor attached to Tetuan Shearn Delamore & Co, solicitors for the plaintiff ('the appellant'). When the said application came up for hearing on 4 April 2001 before the learned SAR, the counsel for the defendant raised a preliminary objection that the affidavit in support of the application should not be deposed by the solicitors for the appellant, but must be deposed by the appellant itself. The defendant contended that since the affidavit in support of the appellant's application was deposed by its solicitors, then the affidavit is defective and thus the application should be dismissed. The learned SAR rejected the affidavit and dismissed the appellant's application and hence the appeal.

Appellant's submissions

The learned counsel for the appellant submitted that the application (as in encl 20) to amend the name of the plaintiff in the title of the writ (encl 1) from 'Malayan Banking Bhd' to 'Aseambankers Malaysia Bhd' is not a contentious matter. It is purely based on clerical error, os part of the solicitors office in preparing the writ. There is nothing to be disputed on the issue. As such it is only proper for the solicitors, who was responsible to prepare the relevant papers to be filed in respect of the action, to depose the said affidavit in support. The appellant also submitted that the said clerical error was only in respect of the title of the writ but not the statement of claim. It was also argued by the appellant that the error was not intentional and did not prejudice the defendant as the name of the plaintiff as stated in the notice of demand was 'Aseambankers Malaysia Bhd'. The appellant is willing to bear the costs of the application before SAR and this appeal, to be paid to the respondent.

Respondent's submission

The respondent, on the other hand, submitted that the amendment to be applied by the appellant (encl 20) involved a question of fact. As such the affidavit in support must be deposed by a representative of the plaintiff, who has knowledge of the matters, but not the solicitors. To support its submission the respondent cited the following authorities:

(i) *Kaplands Sdn Bhd v Lee Chin Cheng Dengkil Oil Palm Plantations Sdn Bhd* [2001] 1 MLJ 297;

(ii) *Tan Pow & Anak-Anak Sdn Bhd v Pelasari Sdn Bhd & Ors* [1999] 1 CLJ 165;

(iii) *Sabah Bank Bhd v Pemborong Keningau Sdn Bhd & Ors* [1991] 3 CLJ 2590;

(iv) *Samsuri Welch bin Abdullah @ Samuel Ponniah Welch v Ong Liang Hee & Anor* [1999] 3 AMR 2955.

For the purpose of this appeal, which shall be by way of rehearing, I shall first consider and determine the issues raised in the preliminary objection by the respondent and subsequently the application of the appellant as in encl 20.

Preliminary objection by the respondent

The only question to be asked for the preliminary objection is: Can a solicitor depose an affidavit for and on behalf of a litigant?

There is no express provisions of law relating to this matter. There is also no provision of law to say that such a affidavit could not be accepted by court. Rule 28 of the Legal Profession (Practice and Etiquette) Rules 1978, says that a solicitor should not appear as such in a matter in which he has reason to believe that he will be a witness in respect of a material and disputed question of fact. In the case of *Million Group Credit Sdn Bhd v Lee Shoo Khoon & Ors* [1986] 1 MLJ 315, Mahadev Shankar J (as he was then) had said (at p 317):

> A second point which needs to be emphasized is that the practice of solicitors themselves filing *contentious affidavits* in pending applications should be discouraged. The parties are the litigants and it is they who should be giving evidence. (Emphasis added.)

In *Seng Huat Hang Sdn Bhd v Chee Seng & Co Sdn Bhd* [1986] 1 MLJ 348, Edgar Joseph Jr J (as he was then) said (at p 350):

> With respect, in matters where *disputed questions of facts* are involved, it is for the parties and not their solicitors to affirm affidavits relating thereto. (Emphasis added.)

Recently, Mohd Hishamudin J in the case of *Kaplands Sdn Bhd v Lee Chin Chen Dengkil Oil Palm Plantations Sdn Bhd* [2001] 1 MLJ 297, had said at p 301:

A With respect, where disputed questions of fact are involved, I think the better view on the issue as to whether or not a solicitor could depose an affidavit on behalf of a litigant would be that as expressed by Shankar J in *Million Group* and by Edgar Joseph Jr J in *Seng Huat Hang*. In the case before me, in the light of the contents of the defendants affidavit, I am satisfied that there were disputed question of fact.

B In another case, *Sabah Bank Bhd v Pemborong Keningau Sdn Bhd & Ors*, it was held that:

> Affidavits are personal to those who depose them and if statements therein are incorrect, the deponents must be liable (and, in appropriate cases, punishable under the Penal Code). So it is not the business of anymore else unless *he is so*
C *authorized*, to depose to fact and much less for counsel to included *contentious materials* in their affidavits. (Emphasis added.)

In *Samsuri Welch Abdullah*, Mohammed Kamil Awang J, ruled that, notwithstanding having been engaged by the plaintiff or having had personal conduct of the matter, the affidavits that were affirmed by the
D counsel in support of the application, were filed in contravention of O 41 r 5 of the Rules of the High Court 1980 ('the RHC'), which reads:

> (1) Subject to O 14, rr 2(2) and 4(2), to para (2) of this rule and to any order made under O 38 r 3, an affidavit may contain only such facts as the deponent is able of his own knowledge to prove.
>
> E (2) An affidavit sworn for the purpose of being used in interlocutory proceedings may contain statements of information or belief with the sources and grounds thereof.

In that *Samsuri Welch*'s case, the court rejected the affidavit deposed by the solicitor on behalf of the plaintiff because the said affidavit sought to introduce in evidence various photographs, by way of exhibits to the said
F affidavits.

Based on the above cited cases, I am of the view that a solicitor may depose an affidavit on behalf of the litigant if all the following conditions are fulfilled:

G (i) the facts to be deposed must not be contentious or disputed question of facts;

(ii) the facts to be deposed must be from his knowledge (if the affidavit is for the purpose of being used in interlocutory proceedings, it may contain statements of information or belief with sources and grounds thereof); and

H (iii) he is authorized to depose the affidavit by the litigant.

In our present case, the plaintiff is seeking leave to amend the name of the plaintiff from 'Malayan Banking Bhd' to 'Aseambankers Malaysia Bhd' appearing in the title of the action in the front page of the writ (encl 1). The original statement of claim still remain. No amendment to be made to it.
I The contents of the affidavit in support (encl 20) by the plaintiff's solicitor contained reasons why such application is necessary, ie 'kesilapan ini berpunca dari kesilapan kekeranian di pihak kami di mana perkataan

'Malayan Banking Bhd' telah dimasukkan sebagai nama plaintif yang sepatutnya 'Aseambankers Malaysia Bhd' (para 6 of the affidavit). At para 7 of the affidavit, it is clearly explained that:

> Kesilapan kekeranian ini hanya melibatkan kepada writ saman bertarikh 14 September 2000 tersebut dan tidak melibatkan kandungan penyataan Tuntutan yang telah disediakan berdasarkan bahawa plaintif adalah Aseambankers Malaysia Bhd dan bukannya Malayan Banking Bhd. Kesilapan ini juga adalah kerana sedikit kekeliruan kekeranian yang mana arahan untuk prosiding ini diterima daripada Malayan Banking Bhd yang merupakan syarikat induk bagi Aseambankers Malaysia Bhd tetapi kemudahan perbankan telah diberikan oleh Aseambankers Malaysia Bhd. Sesalinan perjanjian kemudahan bertarikh 13 November 1995 dilampirkan di sini dan ditandakan sebagai eksh 'SAS–1'.

The rest of the said affidavit deals with depositions that the amendment does not prejudice and not intended to cause confusion or to mislead the defendant. I am of the opinion that the name of the plaintiff in the title of the writ is not a contentious issue as far as the defendant is concerned. It is not part of the statement of claim. If it is part of the statement of claim then it may be said to be contentious because it may change the structure of the evidence to be adduced during trial. In our present case the statement of claim remained unchanged. Of course, the defendant tried to dispute the matter, but to my mind, the dispute is unreasonable. Further more the appellant had explained that 'Malayan Banking Bhd' is the holding company of 'Aseambankers Malaysia Bhd'. Thus, I conclude that the appellant had fulfilled the first condition narrated above.

On the second condition, it is not disputed that the said deponent to the affidavit in support is the solicitor handling the matter. In para 2 thereof, he had deposed that:

> Saya adalah peguamcara yang mengendalikan perkara ini bagi plaintif dan diberi kuasa untuk membuat dan mengikrar afidavit ini bagi pihaknya. Kecuali di mana kelihatan disebaliknya fakta-fakta yang dideposkan dalam afidavit ini selepas ini adalah daripada pengetahuan saya sendiri atau diambil daripada rekod-rekod plaintif dan daripada suratcara-suratcara mahkamah.

The issue that needs to be amended in the application entirely relates to the preparation of the writ to be filed in court. It is common knowledge that, this job is to be done by the solicitors after the plaintiff had handed over the matter to them for litigation in court. Thus, the only person who has personal knowledge about the matter is the solicitor concerned. The plaintiff or any appropriate officer of the plaintiff would not be in the position to know about the fact that the name of the plaintiff was wrongly written in the title of the writ. It is the solicitor who prepared the documentation and thus it is also the solicitor who knows whether the documentation was properly prepared or not, not the plaintiff. It is wrong and improper to get any of the plaintiff's officer (who has no personal knowledge about the particular issue) to depose the affidavit in support of the said application. Order 41 r 5 of the RHC requires that an affidavit may

A contain only such facts as the deponent is able of his own knowledge to prove. As such, I am satisfied that the second condition is also fulfilled.

The third condition to be fulfilled is that the deponent must have been authorized by the plaintiff to depose the affidavit. What the deponent need to do to satisfy this condition is to depose in the affidavit that he was
B authorized by the plaintiff to do so. In our present case the 'real' plaintiff is 'Aseambankers Malaysia Bhd', ie the subsidiary of Malayan Banking Bhd. The deponent is the solicitor acting for the plaintiff, ie Aseambankers Malaysia Bhd. In para 2 of the said affidavit in support the deponent had stated that: 'Saya adalah peguamcara yang mengendalikan perkara ini bagi plaintif dan diberi kuasa untuk membuat dan mengikrarkan afidavit ini bagi
C pihaknya'. To me, with this assertion, the third condition had also been fulfilled.

Authorities cited by the respondent

Now I shall deal with the authorities cited by the defendant. I have
D considered all those cases cited and concluded that these cases could be distinguished from our present one.

In *Kaplands*' case, the plaintiff applied for leave to amend its statement of claim, supported by an affidavit deposed by the plaintiff's solicitors. The paragraph in the statement of claim intended to be amended was para 10,
E ie by deleting sub-paras (b) and (c) to the said para 10. It is obvious that the amendment involved the content of pleadings, ie the statement of claim (not a mere title to the writ as in our present case). It involved substantive evidence of facts on merit of the case, where only the plaintiff or its appropriate officer has knowledge about, but not the solicitors. The effect of the amendment in that case would affect the character of the plaintiff's
F case against the defendant. The judge in that case was correct when he concluded that the facts in question were contentious and there were disputed question of facts. Thus the affidavit was rejected.

In *Tan Pow & Anak-Anak Sdn Bhd*, the court had also rejected the affidavit deposed by the plaintiff's solicitors on the ground that the said
G affidavit was meant to reply the defendant's allegations in its affidavit and in effect to explain that no delay had occurred and also challenged the depositions of the defendant. Again I think the court was correct in rejecting the affidavit because the content obviously involved some contentious materials and disputed questions of facts.

H In *Sabah Bank*'s case the same type of affidavit was also rejected by the court on the grounds that it did not say that the counsel was authorized to depose the affidavit on behalf of the 4th defendant and also that the affidavit involved some contentious facts, for example, in respect of para 5(3) of the affidavit.

In the last case cited by the respondent, ie *Samsuri Welch*, again the
I same type of affidavit was rejected by the court on the ground that the affidavits were in contravention of O 41 r 5 of the RHC. In that case the affidavit was to be used for the purpose of an application for summary

judgment in relation to the plaintiff's claim for inter alia, damages for trespass and nuisance, purportedly committed by the second defendant. The affidavit also sought to adduce in evidence of various photographs, by way of exhibits to the said affidavits. Again, to my mind, the said affidavit was rightly rejected because it tended to introduce new evidence (ie the photographs) that went into the merit of the plaintiff's claim, where the solicitors had no knowledge of.

Decision on preliminary objection

Based on the above consideration, I am satisfied that the respondent's preliminary objection could not stand and thus overruled.

Appellant's applications for amendment (encl 20)

I shall now deal with the applicant's application (encl 20) to amend the title of the writ dated 14 September 2000 to delete the word 'Malayan Banking Bhd' as the name of plaintiff and to substitute it with 'Aseambankers Malaysia Bhd'. The application made under O 20 r 5 of the RHC, is supported by an affidavit in support affirmed by Shaikh Abdul Saleem, solicitor for the applicant (encl 21). The grounds for the application are as appear in para 4–12 of the affidavit:

> 4 Saya sesungguhnya percaya bahawa writ saman tersebut mempunyai kesilapan yang telah dibuat dengan tidak sengaja dan perlu dipinda supaya ia mencerminkan posisi sebenar di antara pihak-pihak yang berkenaan.
>
> 5 Saya merujuk pada nama plaintif di dalam perkara ini dan menyatakan bahawa ianya merupakan suatu kesilapan yang telah dibuat kerana Malayan Banking Bhd bukanlah plaintif bagi tindakan ini. Plaintif bagi tindakan ini adalah sebenarnya Aseambankers Malaysia Bhd.
>
> 6 Kesilapan ini adalah berpunca dari kesilapan di pihak kami di mana perkataan 'Malayan Banking Bhd' telah dimasukkan sebagai nama plaintif yang sepatutnya 'Aseambankers Malaysia Bhd'. Sesalinan writ Saman Terpinda yang dicadangkan dilampirkan di sini bersama-sama permohonan ini.
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> 7 Kesilapan kekeranian ini hanya melibatkan writ samar bertarikh 14 September 2000 tersebut dan tidak melibatkan kandungan penyatan Tuntutan yang telah disediakan berdasarkan bahawa plaintif adalah Aseambankers Malaysia Bhd dan bukannya Malayan Banking Bhd. Kesilapan ini juga adalah kerana sedikit kekeliruan kekeranian yang mana arahan untuk prosiding ini diterima daripada Malayan Banking Bhd yang merupakan syarikat induk bagi Aseambankers Malaysia Bhd tetapi kemudahan perbankan telah diberikan oleh Aseambankers Malaysia Bhd. Sesalinan perjanjian Kemudahan bertarikh 13 November 1995 dilampirkan di sini dan ditandakan sebagai eksh 'SAS–1'.
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> 8 Saya sesungguhnya percaya bahawa kesilapan ini adalah tidak disengajakan dan sesungguhnya tidak memprejudiskan pihak defendan kerana segala rujukan di dalam penyataan tuntutan adalah kepada Aseambankers Malaysia Bhd dan bukannya Malayan Banking Bhd, terutamanya surat tuntutan yang dirujuk di dalam perenggan

13 penyataan tuntutan yang telah dihantar oleh Tetuan Shearn Delamore & Co kepada defendan adalah bagi pihak Aseambankers Malaysia Bhd. Sesalinan surat tuntutan tersebut dilampirkan di sini sebagai eksh 'SAS–2'.

9 Saya juga sesungguhnya percaya bahawa kesilapan ini tidak memprejudiskan dan tidak mengelirukan pihak defendan kerana mereka pada semua masa mengetahui akan kedudukan Aseambankers Malaysia Bhd sebagai plaintif di dalam tindakan ini. Ini dapat dilihat di dalam surat daripada defendan kepada Tetuan Shearn Delamore & Co bertarikh 22 Ogos 2000 yang telah disalinkan kepada pihak Malayan Banking Bhd. Sesalinan surat bertarikh 22 Ogos 2000 tersebut dilampirkan di sini dan ditandakan sebagai eksh 'SAS–3'.

10 Saya sesungguhnya percaya bahawa kesilapan ini adalah kesilapan yang tulen dan telah dibuat secara tidak sengaja tanpa niat untuk mengelirukan pihak defendan.

11 Oleh yang demikian, saya sesungguhnya percaya bahawa writ saman tersebut perlu dipinda seperti mana yang ditunjukkan dengan warna merah dalam salinan yang dilampirkan dengan permohonan ini.

12 Saya sesungguhnya percaya bahawa pindaan yang dicadangkan ini tidak akan memudaratkan pihak defendan kepada keadaan di mana ianya tidak boleh digantikan dengan kos dan/atau menukarkan sifat tuntutan plaintif tetapi adalah perlu untuk mencerminkan tuntutan yang betul terhadap defendan.

The relevant laws

In *Kaplands'* case, Mohd Hishamudin J held that:

> Where a party applies to the court for leave to amend his pleading pursuant to O 20 r 5 of the Rules of the High Court 1980, he must, except in cases where the amendment in plainly and obviously trivial in nature or where there is no opposition to the application, satisfy the court that the application is in compliance with to the principle as laid down by the Federal Court in *Yamaha Motor Co Ltd v Yamaha (M) Sdn Bhd* [1983] 1 MLJ 213.

In *Yamaha Motor Co Ltd v Yamaha (M) Sdn Bhd* [1983] 1 MLJ 213, Mohd Azmi FCJ, in delivering the judgment of the Federal Court ruled (at pp 214–215):

> The general principle is that the court will allow such amendments as will cause no injustice to the other parties. Three basic questions should be considered to determine whether injustice would or would not result: (i) whether the application is bona fide; (ii) whether the prejudice caused to the other side can be compensated by costs; and (iii) whether the amendment would not in effect turn the suit from one character into a suit of another and inconsistent character (see *Mallal's Supreme Court Practice* at p 342).

In our present case, I fully agree with Mohd Hishamudin J in *Kaplands'* case, that the applicant need not satisfy the court with the principle as laid down by the Federal Court in *Yamaha Motor Co Ltd*, if the amendment is plainly and obviously trivial in nature. In our case, I feel that the application of the appellant to amend the title of the writ is plainly and obviously trivial in nature. Thus, it can be allowed without having to satisfy the principle laid down in *Yamaha Motor Co Ltd*.

Assuming I am wrong in coming to this conclusion, I shall now, alternatively, consider the merit of the appellant's application to see whether they comply with the principles laid down in *Yamaha Motor Co Ltd*.

First principle: Whether the application is bona fide?

Reading the affidavit in support of the application, I am satisfied that the application made is bona fide. it arises from clerical error on part of the applicant's solicitors. The error was not intentionally done to confuse or mislead the respondent. As stated in para 4 of the affidavit-in-support, Malayan Banking Bhd is the holding company of Aseambankers Malaysia Bhd; and it was Malayan Banking Bhd that actually gave instruction to take necessary legal proceeding against the respondent for loan granted by Aseambankers Malaysia Bhd. So in preparing for the writ, the solicitors admitted that it was his error in writing Malayan Banking Bhd as the plaintiff where in actual fact, based on the relevant loan documentations, the plaintiff should be Aseambankers Malaysia Bhd. So the amendment is to give a true picture as to the parties involved. The court is willing to accept the reasoning as bona fide.

Second principle: Whether the prejudice caused to the other side can be compensated by costs.

The respondents argued that the amendment will cause prejudice to the respondent in the sense that: (i) looking at the front page of the writ, ie in the title, it appears as if Malayan Banking Bhd is the one which had taken action against the respondent; (ii) the claim involved a large sum of money, ie RM23m; (iii) it had caused confusion to the respondent because the respondent had never taken any loan or banking facility from Malayan Banking Bhd; and (iv) the writ had caused embarrassment to the respondent among the corporate sector.

Looking at all the effects listed above, I am of the view that the prejudicial effects listed by the respondents are not real. It makes no difference in those effects whether the plaintiff is Malayan Banking Bhd or Aseambankers Malaysia Bhd. In fact, with the amendment, all the doubt or prejudicial effect which had been created by the original title in the writ would be cleared and a true picture as to the parties concerned would be in place. If at all the respondent is prejudiced by the amendment, it can always be compensated by costs. The appellant had clearly indicated that they are willing to pay the costs to the respondent.

Third principle: Whether the amendment would not in effect turn the suit from one character into a suit of another and inconsistent character

The amendment is only to change the name of the plaintiff from 'Malayan Banking Bhd' to 'Aseambankers Malaysia Bhd' in the title of the writ (front page). That's all. It does not involve any alteration to the statement of claim at all. The character or the nature of the claim against the respondent is still the same. Thus the question whether the amendment in effect would turn

A the suit from one character into a suit of another and inconsistent character, does not arise at all in this case.

Decision on encl 20

Applying the above principles as laid down by the Federal Court in *Yamaha* B *Motor Co Ltd*, I am fully satisfied that the application had complied with those principles. Therefore, I have no hesitation to hold that the application as in encl 20 should be allowed.

In the premise, I allow the appellant's appeal as in encl 27 with costs to be paid by the appellant to the respondent here as well as proceeding before C the SAR. The decision of the learned SAR dated 4 April 2001 is to be set aside.

Appeal allowed.

Reported by Jafisah Jaafar

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